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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS,

Petitioner,

vs.

THE CITY OF EVANSTON, a
Municipal Corporation,

Respondent.

On
Petition for a Writ of Certiorari to the
Illinois Appellate Court, First District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

INTRODUCTION

In its Brief, Respondent avoids the central questions raised by Petitioner and totally ignores the effects of two cases recently decided by this Court.[1] Instead,

1. Parratt v. Taylor, ___U.S.___,(cont.)

Respondent, by dwelling on "facts" not contained in the record, attempts to reargue issues decided against Respondent which are not pertinent to the important legal and constitutional questions raised in the Petition.

The Brief in Opposition's Statement of the Case inaccurately portrays the procedural and substantive history of this case. Respondent argues throughout its Statement that because of purported irregularities in the use of Petitioner's premises and because of numerous building code violations, Petitioner was neither entitled to a special use at the outset nor did an unconstitutional revocation ever occur. But whatever supposed "irregularities" may have occurred prior

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1. (cont.) 101 S. Ct. 1908 (1981); Schad v. Borough of Mt. Ephraim, ___U.S.___, 101 S.Ct. 2176(1981).

to the issuance of a special use permit were sanctioned by the City when it granted the use. Respondent thus has waived its argument that Petitioner was a "trespasser." After recognizing and accepting Petitioner's use by first granting the permit and later by extending it, Respondent cannot now be heard to argue that the use itself was not legal. (App. to Cert. Petition A38-A59).

Furthermore, Respondent's assertions that the existence of building code violations precluded the issuance of a new or extended special use permit presents a classic "Catch-22" situation, as the trial judge cogently explained:

> The evidence establishes that before a contractor can correct the building violations it must receive permits from the Department of Inspections and Permits. The Department of Inspections and Permits, however, will not issue any permits to make the corrections because the plaintiff does not have a special use permit, and the

> defendant effectively rescinded the plaintiff's special use permit when it revoked the extension of time to make the corrections. Thus, the plaintiff finds itself in a "Catch-22" situation. It cannot, theoretically, be issued a special use permit because of the building violations and it cannot correct the building violations because it does not have a special use permit. It is hard to imagine a more ridiculous postulation. It is tantatmount to giving the plaintiff the "option" of having to fit a round peg into a square hole or a square peg into a round hole.

(App. to Cert. Petition A45)

Respondent also reargues that the revocation of the extension of the special use permit was not a revocation at all, but a legitimate reconsideration. This issue, however, was disposed of by the lower courts, which found the revocation to be an unconstitutional deprivation of procedural due process. (App. to Cert. Petition A10, A48). An examination of Carey v. Piphus, 435 U.S. 247 (1978), reveals that decision to have been

correct. Respondent's argument focuses not upon case law and legal analysis but upon the factual points resolved against Respondent in the lower courts. Respondent's claim that the first appellate court's decision (App. to Cert. Petition A20-A37) was not a finding on the merits is without foundation. Respondent never appealed that decision. The second appellate opinion (App. to Cert. Petition A1-A14) again reaffirms the finding that Petitioner was denied procedural due process. Respondent's claim that the lower court was right but for the wrong reasons is not supported by the specific findings of the trial and appellate courts.

Finally, throughout its Brief, Respondent assigns great importance to Petitioner's having ultimately vacated the premises; the Brief also goes outside of

the record to make assertions concerning the disposition of the property. That discussion is irrelevant, as the legal questions raised herein are not moot. The violation of sec. 1983 is a fact -- it cannot be erased. Therefore, the questions of Petitioner's entitlement to damages and attorneys fees remains. To deny relief here would condone Respondent's denial of due process and would permit a wrong without providing a remedy.

PETITIONER STATED A CAUSE OF ACTION UNDER SEC. 1983.

Petitioner, in its Petition for Certiorari, discusses the existence of a cause of action under sec. 1983 here. Since the writing of that brief, this Court decided Parratt v. Taylor, ___U.S.___, 101 S.Ct. 1908 (1981). Respondent devotes fully one-third of its

Brief to a refutation of Petitioner's argument concerning the lack of an intent standard as an element of a sec. 1983 claim, and in so doing, totally ignores the inescapable force of Parratt. In fact, that case is not even cited. It is Petitioner's position that although its Petition set out how, even before Parratt, it possessed a cause of action under sec. 1983, in light of Parratt that discussion seems almost academic. Parratt obviates a finding that any particular intent was present in order to make out the elements of a sec. 1983 cause of action. The Court instead directs attention to whether a constitutional deprivation took place under color of law. Id., 101 S.Ct. at 1913.

Here, a constitutional deprivation was found and there is no question that in passing the ordinance which denied Petitioner its rights, the Evanston City

Council was acting under color of law. See Petition for Certiorari at 13. Since Parratt resolved the state of mind question, it is clear that the Petitioner made out the requisite elements of a sec. 1983 action.

Petitioner is therefore baffled by Respondent'sreliance on City of Memphis v. Greene, ___ U.S. ___, 101 S.Ct. 1584 (1981); Arlington Heights v. Metropolitan Housing & Dev. Corp., 429 U.S. 252 (1977); and Washington v. Davis, 426 U.S. 229 (1976), to support the proposition that no cognizable sec. 1983 action exists here. Respondent's Brief at 12, 17. Those cases[2] are inapposite -- Arlington Heights and

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2. Petitioner is also confused by Respondent's reliance upon City of Newport v. Fact Conerts, Inc., ___ U.S. ___, 101 S.Ct. 2748 (1981) in its discussion of this issue, see Respondent's Brief at 13, since Petitioner has not requested punitive damages.

Washington v. Davis concerned a violation of the equal protection clause when racial discrimination is at issue. Memphis v. Greene concerned a cause of action brought under 42 U.S.C. sec. 1982 and also under the Thirteenth Amendment. Moreover, Respondent's analysis obscures the distinction between a possible state of mind requirement with regard to the underlying constitutional deprivation and the lack of a state of mind requirement with regard to the statute itself.

Moreover, on a policy level, the Parratt opinion expressed particular concern that state procedures be utilized when seeking legal redress for deprivations of constitutional rights. That is exactly what Petitioner did here. This action was brought in state court and state claims were raised in addition to

the sec. 1983 claims. This Court should ensure that state courts do not restrict the rights of sec. 1983 plaintiffs by unduly constricting the parameters of a cognizable action. Petitioner, as well as others, should have a complete forum in state court.

PETITIONER IS ENTITLED TO ATTORNEYS FEES UNDER SEC. 1988

For similar reasons, the denial of fees in this case raises serious and substantial legal questions. The effects of an erroneous denial of fees under sec. 1988 can practically be as serious as the erroneous constriction of sec. 1983 discussed above. Parratt also highlights the substantiality of the sec. 1988 question. By emphasizing the existence of a sec. 1983 cause of action here, it magnifies the implications of the denial of fees.

Respondent justifies the lower court's denial of fees by invoking the special circumstances doctrine and relying on several specific grounds: first, that Petitioner prevailed on only one of seven counts at the trial level. However, this ignores the fact that Count I embodied all the relief Petitioner requested. By granting relief on Count I, it was unnecessary to rule on the other counts. The overwhelming and overriding issue was Petitioner's right to remain and practice their religion -- this issue was won when the injunction issued. The trial court also found that a sec. 1983 action existed and found a procedural due process deprivation. The loss of damages and attorneys fees, while important, would not by itself ensure the vindication of Petitioner's First Amendment rights. To

illustrate, suppose the injunction had been denied, but damages granted -- Petitioner would still be without a place to worship. However, the converse is not true.

Respondent further justifies this result by referring to the appellate court's declaration that the substantive due process and First Amendment questions here were moot. Even if they were, that point is irrelevant. Having won on the procedural due process issue, fees should have been granted.

Moreover, it is also irrelevant that Petitioner was not acting as a private attorney general and that it is not a plaintiff of limited financial means. The Fifth Circuit recognized, very recently, that such issues do not constitute the presence of special circumstances to deny

fees and that the discretion to refuse fees under sec. 1988 is "exceedingly narrow." Ellwest Stereo Theater v. Jackson, No. 80-7856 (5th Cir., August 17, 1981)(App.A1)

PETITIONER'S FIRST AMENDMENT RIGHTS WERE VIOLATED.

Finally, Respondent contends that no First Amendment violation can be found here, that this is a "garden variety zoning case" and that " deprivation of rights under a zoning ordinance is not sufficient to give rise to a substantive federal question." But First Amendment claims which are of substantial importance can arise in the zoning context, as the Court made clear this last Term in Schad v. Borough of Mt. Ephraim, ___U.S.___, 101 S.Ct. 2176 (1981), which is entirely ignored by Respondent. In Schad, Justice White declared: "(T)he zoning power is

not infinite and unchallengeable; it 'must be exercised within constitutional limits.'" Id., 101 S.Ct. at 2182. Petitioner does not contend that religious institutions are not subject to zoning ordinances, nor does it claim that the zoning ordinance at issue here is unconstitutional on its face, but that in its application in this case, a protected interest is involved and a valid First First Amendment claim arose. See Petition for Certiorari at 24-27.

Petitioner contends that Respondent's actions could only be justified by a showing of a compelling or substantial state interest and Schad supports the application of this test. Id., 101 S.Ct. at 2182-2183. Here, Petitioner had its special use permit unconstitutionally revoked and it lost its right of continued

worship on those premises and its expectation of uninterrupted worship. Respondent did not demonstrate any government interest sufficiently substantial or compelling to outweigh Petitioner's rights. Moreover, the Court in Schad pointed out that the presence of First Amendment discrimination would create a much more serious case and Petitioner contends that the actions of the City Council here discriminated against it on the basis of its religion. See Petition for Certiorari at 26-27. This Court should grant certiorari to determine that the activity here was protected and therefore, that Respondent could avoid a finding of deprivation of First Amendment rights only by demonstrating that a compelling or substantial interest existed for its actions.

CONCLUSION

Parratt and Schad support Petitioner's argument that the questions raised in its Petition for Certiorari are important and substantial federal questions. For the reasons discussed in this Reply Brief, as well as those included in the Petition for Certiorari, Petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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A P P E N D I X

A1

ELLWEST STEREO THEATRE, INC.,

Plaintiff-Appellant,

v.

Maynard JACKSON, et al.,

Defendant-Appellee,

DIXIE BOOKS, INC., et al.,

Plaintiffs-Appellants,

v.

CITY OF ATLANTA, Georgia, et al.,

Defendant-Appellees.

VRS INC., d/b/a Bookstore, et al.,

Plaintiff-Appellant,

v.

CITY OF ATLANTA, Georgia, et al.,

Defendant-Appellees.

A2

U.B. INC.,etc., et al.,

Plaintiffs-Appellants,

v.

Maynard JACKSON, etc., et al.,

Defendants-Appellees.

SHOWCASE CINEMAS, INC., etc.,

Plaintiff-Appellant,

v.

Maynard JACKSON, etc., et al.,

Defendants-Appellees.

No. 80-7856

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Unit B

August 17, 1981

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, and KRAVITCH and HATCHETT, Circuit Judges.

GODBOLD, Chief Judge:

Appellants, several adult entertainment establishments, sued appellees, the city of Atlanta and several of its officers in their official capacity, seeking declaratory and injunctive relief under 42 U.S.C. sec. 1983. They alleged that the city's adult establishment licensing ordinance violated the Constitution on several grounds. After a hearing the district court issued a preliminary injunction

and, upon submission of further briefs and evidence, permanently enjoined enforcement of several sections of the ordinance. Appellees did not appeal that judgment.

Appellants moved for attorneys' fees under 42 U.S.C. sec. 1988. Recognizing that appellants were prevailing parties under the statute, the district court nevertheless denied the motion on the ground that special circumstances rendered an attorney fee award unjust. The special circumstances relied on by the district court were: (1) appellees enacted the ordinance as part of a good faith effort to regulate adult establishments; (2) their good faith was bolstered by a decision of the Georgia

Supreme Court that the ordinance was valid, Airport Book Store Inc. v.Jackson, 242 Ga. 214, 248 S.E.2d 623 (1978), cert. denied, 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1057 (1979); (3) appellees did not appeal the grant of a permanent injunction; and (4) appellants were financially capable of absorbing the cost of their successful attack upon the ordinance.

Prevailing plaintiffs are entitled to attorneys' fees unless special circumstances render an award unjust, International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502, 503 (5th Cir. 1980). Although a district court's grant or denial of attorneys' fees is reviewable only for abuse of discretion, the discretion afforded district courts

to deny attorneys' fees to prevailing plaintiffs under sec. 1988 is exceedingly narrow, Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd., 643 F.2d 1034, 1041 (5th Cir.1981); Riddell v.National Democratic Party, 624 F.2d 539, 544 (5th Cir. 1980). None of the circumstances relied upon by the district court, either individually or collectively, amount to special circumstances justifying a denial of attorneys' fees. The good faith of government defendants acting in their official capacity is not a relevant factor for the district court to consider when determining whether special circum-

stances exist, see e.g., Aware Woman Clinic v. City of Cocoa Beach, 629 F.2d 1146,1149 n.3 (5th Cir.1980); Robinson v. Kimbrough,620 F.2d 468,478 (5th Cir.1980); Universal Amusement Co. v Hofheinz, 616 F.2d 202,204 n.1 (5th Cir. 1980).[1] Moreover, prevailing plaintiffs'

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1. As the district court noted, Universal Amusement is a case "strikingly similar to this one." In Universal Amusement this court reversed a district court's denial of attorneys' fees where plaintiffs had successfully challenged a city ordinance that prohibited the operation of adult establishments within 2000 feet of a church, school, or other educational or charitable institution. The district court sought to distinguish Universal Amusementby pointing out that the case relied upon by the panel in concluding that good faith was irrelevant, Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir.1978), stands only for the proposition that good

ability to pay is not a special circumstance rendering an award under sec. 1988 unjust, International Oceanic Enterprises, Inc. v. Menton, supra, 614 F.2d at 503, nor is defendant's decision not to appeal the injunction, cf. Aware Woman Clinic, supra, (defendants elected not to appeal merits yet panel reversed denial of attorneys' fees).

A previous state supreme court decision upholding Atlanta's adult establishment licensing ordinance is also not a special circumstance justifying a

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1. (cont.)
faith is not a controlling factor in deciding whether to award attorneys' fees. While Morrow may stand only for that proposition, Universal Amusement and its progeny clearly have extended Morrow and held that good faith is irrelevant, see Knights of Ku Klux Klan; Riddell; Aware Woman Clinic; Robinson.

denial of attorn ys' fees. Appellees reliance upon that decision is a specific articulation of good faith, but as we have noted, good faith is not relevant in determining whether appellants are entitled to attorneys' fees from appellees in their official capacity. Similar reformulations of the good faith argument have been rejected by this court. We have refused to recognize as a special circumstance defendants' reliance upon previous decisions from other jurisdictions upholding statutes similar to the statute under attack, Johnson v. State of Mississippi, 606 F.2d 635,637 (5th Cir.1979), and arguments that defendants' conduct was required by the state legislature, id.

We reverse the district court's denial of attorneys' fees and remand for an appropriate determination of the amount of the award, see Johnson v. Georgia Highway Express, Inc, 488 F.2d 714 (5th Cir. 1974).

REVERSED and REMANDED.